Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-2049

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioner Railway Labor Executives' Association

* Counsel of Record

Date: June 14, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission's jurisdiction over financial transactions concerning railroads relieve the rail carriers participating in such transactions of their obligations under the Railway Labor Act to bargain for the protection of employees when the Commission has concluded that employee protections are not required to be imposed as an exercise of its discretion under the Interstate Commerce Act?

2. Do the United States District Courts have jurisdiction to enforce the commands of the Railway Labor Act, even though the rail carrier, which is claimed to have violated the Railway Labor Act, is participating in a transaction exempted from regulation by the Interstate Commerce Commission?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
This Case Presents Issues That Are Important To The Orderly Administration Of Two Acts Of Congress—The Interstate Commerce Act And The Railway Labor Act—Regulating Different Aspects Of Interstate Rail Commerce. Moreover, The Lower Courts Are Divided On The Proper Relationship Between These Two Important Acts Of Congress	9
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

ALPA v. Transamerica Airlines, Inc., 817 F.2d 510 (9th Cir.), *cert. denied*, 108 S. Ct. 451 (1987) 16

Burlington Northern R.R. v. United Transportation Union, 8th Cir. Nos. 87-2581 and 87-2600 (decided May 31, 1988) ..... *passim*

Burlington Northern R.R. v. United Transportation Union, N.D.Ill. No. 88 C 2687 (decided June 9, 1988) 15

Chicago & North Western Transportation Co. v. Railway Labor Executives' Association, N.D.Ill. No. 88 C 0144, decided March 16, 1988, *appeal pending*, 7th Cir. No. 88-1504 (argued April 21, 1988) 11

CSX Transportation, Inc. v. United Transportation Union, W.D.N.Y. No. 87-CIV-1391C, decided May 26, 1988, *appeal pending*, 2d Cir. No. 88-7461 11

Denver & Rio Grande Western R.R.—Trackage Rights, ICC Finance Docket No. 30,000 (Sub-No. 18), served May 18 and October 25, 1983 ..... 9, 11

Detroit & Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142 (1969) 8

Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945) 7

Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. Interstate Commerce Commission*, 817 F.2d 145 (D.C. Cir. 1987) (table) 4, 5, 13

Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. ——, 96 L. Ed.2d 222 (1987) 12

Maine Central R.R.—Exemption, ICC Finance Docket No. 30532, served September 13, 1985, *aff'd sub nom. RLEA v. ICC*, D.C. Cir. No. 85-1636 (decided March 16, 1987 (unpublished) 9-10

TABLE OF AUTHORITIES—Continued

Page

New York Dock Ry.—Control—Brooklyn E.D.T., 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979) 4

Order of Railroad Telegraphers v. Chicago & North Western Ry., 362 U.S. 330 (1960) 16

Oregon Short Line R.R.—Abandonment, 360 I.C.C. 91 (1979) 4

Railway Labor Executives' Association v. Chicago & North Western Transportation Company, et al., 8th Cir. No. 87-5071 (decided May 31, 1988) ..*passim*

Railway Labor Executives' Association v. Guilford Transportation Industries, Inc., Sup. Ct. No. 87-1911 ..... 2, 15

Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R., 831 F.2d 1231 (3rd Cir. 1987), *pet. for cert. pending*, Sup. Ct. No. 87-1589 .....*passim*

Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R., 845 F.2d 420 (3rd Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1888 .....*passim*

United States v. Lowden, 308 U.S. 225 (1939) 10

STATUTES AND OTHER MATERIALS:

Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* .....*passim*

Section 10101, 49 U.S.C. § 10101 10

Section 10505, 49 U.S.C. § 10505 .....3, 4, 13, 15

Section 10901, 49 U.S.C. § 10901 .....3, 4, 13

Section 10903, 49 U.S.C. § 10903 3

Section 10903(b)(2), 49 U.S.C. § 10903(b)(2) 4

Section 11341(a), 49 U.S.C. § 11341(a) 9

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* 7, 11, 14

Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* .....*passim*

Section 1a(4), 45 U.S.C. § 151a(4) 7

Section 1a(5), 45 U.S.C. § 151a(5) 7

TABLE OF AUTHORITIES—Continued

	Page
Section 2 First, 45 U.S.C. § 152 First	3
Section 2 Seventh, 45 U.S.C. § 152 Seventh	3
Section 6, 45 U.S.C. § 156	*passim*
28 U.S.C. § 2101(c)	2
28 U.S.C. § 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ———

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] [1] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision of that court which was entered on May 31, 1988, in *RLEA v. Chicago & North Western Transportation Company, et al.*, 8th Cir. No. 87-5071.

---

[1] RLEA is an unincorporated association of the Chief Executive officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this country, including rail employees of respondent Chicago & North Western Transportation Company. A list of RLEA's member organizations is attached to this petition as Appendix F at 20a.

OPINIONS BELOW

The decision of the court of appeals is not reported at this time, but is reproduced herein at pages 1a-5a as Appendix A. The Judgment of the appellate court is reproduced herein at page 14a as Appendix D. None of the decisions by the United States District Court for the District of Minnesota is reported officially. The district court's decision from which the appeal was taken was given orally on January 7, 1987 and is reproduced herein at pages 6a-7a as Appendix B-1. Included as a part of that Appendix, at page 8a, is the order entered by the district court on January 8, 1987, granting respondents' motions for summary judgment. Petitioner has also included in the Appendix to this Petition at pages 9a-10a, as Appendix B-2, the decision of the district court which was rendered orally on August 27, 1986, denying petitioner's request for a preliminary injunction to enjoin the sale of the rail line at issue; the order entered by the district court on August 27, 1986, formalizing that ruling is reproduced herein at page 11a. Reproduced herein at pages 12a-13a as Appendix C is the Notice of Exemption which the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] served on September 8, 1986, dealing with the sale which is at issue in this case.

JURISDICTION

The divided opinion of the panel of the Eighth Circuit, with Chief Circuit Judge Lay dissenting, was entered on May 31, 1988. Petitioner has not sought rehearing, and is filing this petition within the time prescribed by 28 U.S.C. § 2101(c). Petitioner is seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Like several other petitions which are pending before this Court (*e.g.*, Sup. Ct. Nos. 87-1911 and 87-1888), this case involves the relationship between two Acts of

Congress regulating aspects of interstate commerce—*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* This case, however, involves primarily the impact of Sections 10505 and 10901 of the Interstate Commerce Act, 49 U.S.C. §§ 10505, 10901, on the rights protected and obligations imposed by Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. § 152 First, 152 Seventh and 156. Those statutory provisions are reproduced herein at pages 15a-19a as Appendix E.

STATEMENT OF THE CASE

This case is another in a series of cases which have arisen from the rail industry's exploitation of the ICC's belief that Congress has given that agency exclusive jurisdiction over all aspects of rail financial transactions subject to its regulation, including labor relations matters. As this case shows, the lower courts are irreconcilably divided as to the proper relationship between the ICC's authority over rail financial transactions and rail labor's collective bargaining rights under the Railway Labor Act.

Respondent Chicago & North Western Transportation Company [hereinafter, "C&NW"] is a class I rail carrier that in early 1986 operated over 7,000 miles of rail lines in the midwestern portion of this country. Like most railroads in this country, respondent C&NW has been examining its rail system to identify lines that were not, in its opinion, adequately contributing to its financial viability, and prior to 1985 it used the abandonment provisions of the Interstate Commerce Act, 49 U.S.C. § 10903, to shed itself of those undesirable lines. In 1985, however, respondent C&NW "determined to seek alternative methods of disposition of marginal or light-density lines other than abandonment." Joint Appendix in 8th Cir. No. 87-5071 [hereinafter, "J.A."] at 47. That "alternative method" was to take advantage of a

newly promulgated policy of the ICC whereby the Commission had granted a class exemption under 49 U.S.C. § 10505 to all newly-formed rail carriers from the prior approval requirements of 49 U.S.C. § 10901. *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table). The attractiveness of that policy to the C&NW was that the Commission had concluded that it should not exercise its discretion under Section 10901 to impose upon the selling rail carrier the fair arrangement for the protection of employees which it was required by the abandonment provisions of the Interstate Commerce Act, *i.e.*, 49 U.S.C. § 10903(b)(2),[2] to impose for the protection of employees affected by an abandonment.[2] *See, Ex Parte No. 392, supra*, 1 I.C.C. 2d at 815.

In July 1986, respondent C&NW entered into an agreement with respondent Dakota, Minnesota & Eastern Railroad Corporation [hereinafter, "DM&E"], a newly-formed rail carrier, whereby the C&NW would sell an 826-mile portion of its line to the DM&E for continued rail operations, and would grant or assign to that new carrier trackage rights over an additional 139 miles of track. J.A. at 47, 61. That agreement did not require the DM&E to assume the C&NW's collective bargaining agreements, and although the DM&E planned to hire approximately 144 employees and to give "preference in hiring to" C&NW employees (J.A. at 104), those employees would work under entirely new rates of pay, rules and working conditions. Respondent C&NW in-

---

[2] That form of employee protection, known as the *Oregon Short Line* conditions, was promulgated in *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979), and is similar in both monetary and procedural protections to those imposed in merger and purchase cases, *i.e.*, the *New York Dock* conditions. *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979) *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

tended to abolish 169 positions when it sold that line. J.A. at 60.

Once rail labor learned of the possible sale, seven RLEA member organizations which represent C&NW employees served notices on respondent C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements to require advance notice of any sale, to provide protections for employees similar to those normally imposed by the ICC in abandonment cases, to require the C&NW to obtain a commitment from any purchaser of its lines to hire the affected employees, to apply the C&NW rates of pay, rules and working conditions, and to give ICC-type protections to affected employees. J.A. at 34. As respondent C&NW informed the district court (J.A. at 62; emphasis added):

> In each case, the C&NW responded to those notices in writing by proposing a meeting date *to discuss* the demands but informing the organization that such meeting was without prejudice to the carrier's position that such notices were improper because they usurped matters within exclusive managerial prerogatives, usurped matters within the sole jurisdiction of the Interstate Commerce Commission and matters preempted by the Interstate Commerce Act and they related to matters not within the proper scope of collective bargaining agreements with the organization.

While rail labor and the C&NW were engaged in those "discussions," both the C&NW and the DM&E filed verified notices with the ICC on August 14, 1986, to exercise the exemption which had been granted by *Ex Parte 392*; under the Commission's regulations, that exemption became effective on August 21, 1986. RLEA responded by filing a suit with the United States District Court for the District of Minnesota on August 19, 1986, seeking both declaratory and injunctive relief to require respondent C&NW to bargain with rail labor over the

impact of the proposed sale on its employees and over the pending Section 6 notices. Petitioner also sought to enjoin the C&NW from changing the status quo until it had complied fully with its bargaining obligations under the Railway Labor Act. J.A. at 13-14. RLEA thereafter sought a preliminary injunction to restrain respondents from altering the status quo by selling the line. J.A. at 2.

On August 27, 1986, the district court denied RLEA's injunctive request. Appendix B-2 at 9a-11a. According to the district court: "I am convinced that if I were to grant the preliminary injunction, I would be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." *Id.* at 9a-10a. Rail labor did not seek appellate review of that ruling and on September 4, 1986, the C&NW sold its line to the DM&E. J.A. at 180-81. As a result of that sale, the C&NW abolished at least 169 positions; the DM&E then hired 101 C&NW employees to staff its operations. J.A. at 93, 97, 181.

RLEA thereafter sought to enforce the bargaining obligations of the Railway Labor Act through its suit and to obtain back pay for the employees who were affected by the premature alteration of the status quo. But on January 7, 1987, the district court granted respondents' motions for summary judgment ruling that (Appendix B-1 at 6a):

> This case is going to depend upon whether [*Ex Parte*] 392 in its present form applies or sinks. That's going to require decisions by courts higher than this one. But to this Court, a reading of Ex Parte 392 demonstrates that the ICC felt that it is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. And the decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by Ex Parte 392.

RLEA noted an appeal to the United States Court of Appeals for the Eighth Circuit.

On appeal, as well as before the district court, appellee C&NW argued that an alternative reason for denying rail labor's request for injunctive relief was that the dispute between the C&NW and its unions was in reality a "minor dispute"[3] under the Railway Labor Act because the carrier claimed it had the contractual right from its Reduction In Force provisions in its collective bargaining agreements, and from the past practice concerning line abandonments, to sell its line and abolish jobs without first engaging in bargaining under the Railway Labor Act. C&NW Brief in 8th Cir. No. 87-5071 at 44-49. RLEA, on the other hand, maintained that the dispute was a "major" dispute (*see* note 3, *supra*) which required both notice and bargaining, because, by selling its rail lines, respondent C&NW was altering existing working conditions. RLEA Brief in 8th Cir. No. at 87-5071 at 16-18.

On May 31, 1988, the Eighth Circuit issued its decisions in this case and in *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600,[4] in which the court

---

[3] A "minor dispute" under the Railway Labor Act is one "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5); *see, Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945). This form of dispute is to be contrasted with a "major dispute" which is one "concerning rates of pay, rules, or working conditions" (45 U.S.C. § 151a(4)) and arises where a party seeks to formulate a new agreement or to alter an existing one unilaterally. *Elgin, Joliet & Eastern Ry. v. Burley, supra.* This distinction is important, because minor disputes may not be resolved by a strike, but are to be resolved by adjustment boards which have exclusive jurisdiction to interpret collective bargaining agreements.

[4] The Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* was also at issue in the *Burlington Northern* case. RLEA reproduced the *Burlington Northern* decision as Appendix A to its brief in response to the petition in Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*. That decision was also submitted by the Pittsburgh &

addressed the relationship of the Interstate Commerce Act to the Railway Labor Act. In this case, the court observed that rail labor had served Section 6 notices to bargain over the sale and its impact on employees, and then stated (Appendix A at 3a, *quoting Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 149, 153 (1969)):

> Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved.

Although the appellate court rejected respondent C&NW's alternative minor dispute argument, it nevertheless went on to hold that the Interstate Commerce Act's provisions giving the ICC the power to impose employee protections "supersede the mandatory bargaining requirement of the RLA." *Id.* at 4a. The court then quoted as follows from its *Burlington Northern* decision (*Id.* at 4a-5a; emphasis in original):

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements.

Chief Circuit Judge Lay dissented from the panel's decision. Agreeing with the Third Circuit's conclusion in

---

Lake Erie Railroad in a Supplemental Brief which it filed in Sup. Ct. No. 87-1888.

RLEA v. Pittsburgh & Lake Erie R.R., 845 F.2d 420 (3rd Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1888, Chief Judge Lay stated (*Id.* at 5a):

> I cannot agree that the Interstate Commerce Act . . . (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act . . . (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. . . .

REASONS FOR GRANTING THE WRIT

This Case Presents Issues That Are Important To The Orderly Administration Of Two Acts Of Congress—The Interstate Commerce Act And The Railway Labor Act—Regulating Different Aspects Of Interstate Rail Commerce. Moreover, The Lower Courts Are Divided On The Proper Relationship Between These Two Important Acts Of Congress

1. In 1983, the ICC issued two decisions in which it concluded that its approval of unification financial transactions operated to relieve the rail carriers participating in those transactions from their obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ICC Finance Docket No. 30,000 (Sub-No. 18), *Denver & Rio Grande Western R.R.—Trackage Rights*, served May 18 and October 25, 1983 (reproduced in Appendix to ICC Petition for Certiorari in Sup. Ct. No. 85-792, *ICC v. BLE*, *at* 51a-68a). Although the ICC, in reaching that conclusion relied solely on the immunity granted by 49 U.S.C. § 11341(a) to carriers participating in unification transactions approved by the Commission, the Commission soon expanded its justification for stating that its orders relieved rail carriers of their Railway Labor Act and contractual obligations to their employees. In ICC Finance Docket No. 30532, *Maine Central R.R.—Exemption*, served September 13, 1985, *aff'd sub nom. RLEA v. ICC*, D.C. Cir.

No. 85-1636 (decided March 16, 1987) (unpublished) (reproduced in ICC's Petition in Sup. Ct. No. 85-792, *ICC v. BLE* at 40a-51a), the ICC stated that Congress gave it exclusive jurisdiction over all matters arising from rail financial transactions subject to its regulation under the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, including, in particular, labor relations matters; as the Commission stated: "It is manifest that Congress in 1976 intended the protection afforded labor to be limited by the conditions imposed in the pertinent Commission proceeding." *Id.* at 6; ICC Pet. at 49a. Since, according to both the ICC and the railroads, rail labor may look only to the Commission to protect its interests, it logically follows, their argument continues, that rail labor may not rely upon the Railway Labor Act to compel a rail carrier to negotiate over the manner in which employees will be affected by a transaction subject to regulation by the Commission.

Employee protective arrangements, as well as collective bargaining concerning management decisions which will have a crucial impact on employee working conditions, have been a way of life in the rail industry since the enactment of the Railway Labor Act in 1926, and, thus since long before the ICC began to impose provisions to protect employees in the late 1930's. *E.g.*, *United States v. Lowden*, 308 U.S. 225, 234-36 (1939); Agreement dated January 31, 1932 in Chicago, Illinois (Included in the Agreement Records of the National Mediation Board under 45 U.S.C. § 155 Third (e)). Consequently, it should not be a shock to anyone even vaguely familiar with the rail industry that the ICC's recent policy of being the sole source of employee protection in rail financial transactions would be eagerly accepted by the railroads, but as equally resisted by rail labor.

That is exactly what has happened, for over the past five years there has been a constant source of tension between rail labor and management as rail labor has re-

sisted the railroads' efforts to use the ICC's view of its powers both as a means to abrogate existing contractual rights and as justification for refusing to bargain for new rights to ameliorate the adverse consequences which flow from sales or from other changes in rail operators. Rail labor first appealed to the courts to enforce the Railway Labor Act, but initially that appeal was unsuccessful; the case at bar is one of the first rejections of rail labor's request for judicial assistance. Rail labor then engaged in strikes, and this brought a temporary lull in the railroads' onslaught. *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *pet. for cert. pending*, Sup. Ct. No. 87-1589. But now the carriers are attempting to get around the Norris-LaGuardia Act by asserting that these disputes are actually minor disputes subject to arbitration and thus enjoinable. *E.g.*, *Chicago & North Western Transportation Co. v. RLEA* N.D.ILL. No. 88 C 0444, decided March 16, 1988, *appeal pending*, 7th Cir. No. 88-1504 (argued April 21, 1988); *CSX Transportation, Inc. v. UTU*, W.D.N.Y. No. 87-CIV-1391C, decided May 26, 1988, *appeal pending*, 2d Cir. No. 88-7461.

Recently, the National Railway Labor Conference [hereinafter, "NRLC"] [5] informed this Court that: "[Rail labor's efforts to enforce its statutory and constitutional rights to bargain] is the most litigated and most important railway labor-management controversy now facing the federal courts." NLRC Brief as *Amicus* in Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA* at 8. Indeed, in 1985, the NRLC expressed the same view in a case which arose from rail labor's attempt to have reviewed the ICC's conclusion in the *Denver & Rio Grande* decisions that its orders superseded the Railway Labor Act; as the NLRC stated in its brief as an *amicus* in

[5] *Amicus* NRLC "is an unincorporated association which includes almost all of the nation's Class I railroads among its members." NRLC Brief in No. 87-1888 at 4.

support of the ICC's petition in Sup. Ct. No. 85-792, *ICC v. BLE*: "The role of the RLA in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today." NRLC Brief in Support of Petitions in Nos. 85-792 and 85-793 at 17. This Court apparently agreed in 1985 that this issue was important because it granted the petitions in those cases. Unfortunately, the Court did not reach the main issue as to the proper relationship between the two Acts (*see, ICC v. BLE*, 482 U.S. —, 96 L. Ed.2d 222 (1987)), and this problem has continued to worsen.

RLEA agrees fully with the NRLC's belief that the issues presented by this and other similar cases are important to the industry and need to be resolved by this Court. Rail labor and management are divided on fundamental issues which are essentially legal in nature and thus, will most likely not be able to resolve this dispute through negotiation; indeed, court bargaining becomes less likely when, as occurred in this case, a court informs the railroads that they are relieved of their bargaining obligations by the ICC's jurisdiction over rail sales. *E.g.*, Appendix A at 4a-5a. From the beginning of this dispute, rail labor and management have recognized that they need the help of the courts to resolve this dispute, but as a comparison of this case with the Third Circuit's decision in *RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *pet for cert. pending*, Sup. Ct. No. 87-1888, shows, the lower courts are divided on the proper relationship between these two Acts of Congress. Thus, the industry clearly needs the aid of this Court to resolve this dispute. Since the issues presented by this case are so important to the orderly administration of both the transportation and the labor statutes, RLEA urges this Court to resolve this dispute.

2. In *RLEA v. Pittsburgh & Lake Erie R.R., supra*, the Third Circuit addressed the question of whether rail

labor could enforce the Railway Labor Act in a case arising out of a rail line sale which was exempted by *Ex Parte No. 392* from regulation under 49 U.S.C. § 10901. After addressing the purposes behind both Acts—*i.e.*, the Interstate Commerce Act and the Railway Labor Act—the Third circuit first rejected the carrier's argument that enforcement of the Railway Labor Act would be a collateral attack on the ICC's exemption, and then concluded that the ICC's exemption of the sale of the railroad under Section 10505 from the prior approval requirements of Section 10901, did not relieve the selling railroad of its obligations to its employees under the Railway Labor Act. In the *C&NW* case, on the other hand, the Eighth Circuit accepted the ICC's conclusion that Congress gave that agency exclusive jurisdiction over all labor relations matters arising from financial transactions and then concluded that "the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements." Appendix A at 4a-5a. Those two decisions are clearly in conflict with each other. RLEA respectfully submits, the Third Circuit's decision represents the proper reading of the two Acts of Congress and reaches a result which assures continued rail operation; the Eighth Circuit's decision, however, does neither.

In the Eighth Circuit's companion case to the *C&NW* decision, *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600, decided May 31, 1988, the Court explained why it concluded that the transportation statute superseded the Railway Labor Act. As the appellate court stated, the question presented was whether to "harmoniz[e]ing" a labor statute with a statute in another field, and since it erroneously surmised that the two statutes "provide an essentially duplicative or overlapping process designed to reach labor protective agreements," it concluded that the transportation statute superseded the labor statute. *Burlington Northern*, slip op. at 12 (RLEA

Brief in No. 87-1589 at 12a). That decision was only a part of the *Burlington Northern* case, for the court then followed the clear commands of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq*, and concluded that the federal courts lacked jurisdiction to enjoin a strike over the absence of a protective arrangement; as the appellate court explained (slip op. at 16, RLEA Brief in 87-1589 at 16a):

> . . . [T]his notion of the viability of the Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. . . .

Unfortunately, by refusing to enforce the Railway Labor Act, the Eighth Circuit has forced rail labor to use its economic power to bring the carriers to the bargaining table; the Railway Labor Act, however, was designed to prevent the need to use self-help for such an elementary purpose by imposing a legal obligation requiring the carrier to go to the bargaining table to resolve disputes *before* they reached the level that either side would need to use its economic power. Consequently, it is important to the national need for a rail service uninterrupted by labor strife that this Court resolve these diametrically opposed decisions by the Third and Eighth Circuits .

3. When the Eighth Circuit's sparsely reasoned decision is examined, it becomes clear that the court's conclusion rests on its assumption that the Railway Labor Act's bargaining processes, when compared to the ICC's responsibility to consider employee interests, constituted "an essentially duplicative or overlapping process designed to reach labor protective agreements." Appendix

A at 4a-5a. That assumption, RLEA respectfully submits, permeates all four of the cases, including this one, which are pending before this Court raising the issue of the proper relationship between the Railway Labor Act and the Interstate Commerce Act; *i.e.*, Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA* (Norris-LaGuardia Act case); Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA* (Railway Labor Act case); Sup. Ct. No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.* (Lease Exemption case).

All four of these cases have another fact in common, and that is that they all involve exemptions under 49 U.S.C. § 10505 from regulation under the Interstate Commerce Act. That factor, RLEA respectfully submits, is important to a proper balancing of the two Acts of Congress, for as the United States District Court for the Northern District of Illinois recently stated in *Burlington Northern R.R. v. UTU*, N.D.ILL. No. 88 C 2687, decided June 9, 1988 (slip op. at 18; RLEA Supplemental Brief in No. 87-1911 at 18a):[6]

> [T]ransactions exempted [under § 10505] from administrative approval are by definition transactions that do not impact the transportation policy of the ICA. The ICC exempts a transaction such as a trackage rights agreements [or, here, a § 10901 sale] only if the ICC finds that [regulation of] the transaction is not necessary to carry out the transportation policy" of the Staggers Act. . . . Thus, in any direct or indirect conflict between an exemption pursuant to § 10505 and a fundamental time-honored federal labor policy, the former must yield.

Three of the cases (*i.e.*, Sup. Ct. Nos. 87-1911, 87-1888 and this case) present the question of whether enforcement of the Railway Labor Act in exemption cases would

---

[6] Petitioners are submitting the district court's decision in the latest *Burlington Northern* case to this Court in a Supplemental Brief in *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911.

constitute an impermissible collateral attack on the ICC's exemption order. According to the First Circuit in the *Guilford* case and to the district court in this case, enforcement of the labor statute would constitute a collateral attack, whereas, according to the Third Circuit it would not. RLEA, of course, submits that the Third Circuit's decision is the correct ruling on this issue.

Another similarity which runs through the cases, although to differing degrees, are the questions of whether the carriers have an obligation under the Railway Labor Act to give notice under Section 6 of that Act, 45 U.S.C. § 156, and to preserve the status quo pending bargaining if RLEA is correct in asserting that the carrier's Railway Labor Act obligations are not excused by the ICC's jurisdiction over labor relations matters. While initially challenged in the *Guilford* case, the carriers' bargaining obligation is now too clear to be in serious dispute in that case. *E.g., Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 338-41 (1960); *ALPA v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 451 (1987). However, a carrier's bargaining and status quo obligations are specifically raised in the second *Pittsburgh & Lake Erie* case (*i.e.*, Sup. Ct. No. 87-1888), and were raised in this case as an alternative justification to uphold the judgment.

When the various issues presented by the four cases are examined, RLEA respectfully submits, the *Guilford* case appears to be the best vehicle to resolve most of the issues which have been raised by rail labor's challenge to the ICC's opinion that the Commission has been charged by Congress with the exclusive responsibility to resolve labor disputes associated with rail financial transactions subject to its jurisdiction.[7] Therefore, RLEA once again urges this Court to review that case. But if

[7] The one issue which none of these cases addresses is whether Section 11341(a)'s immunity extends to a carrier's Railway Labor Act obligations.

this Court decides to address solely the conflict between the second *Pittsburgh & Lake Erie* case and this case, RLEA respectfully submits that this case is the better vehicle of those two for essentially two reasons. First, the Pittsburgh & Lake Erie's precarious financial situation, its active search for a purchaser, and the on-going mediation by the National Mediation Board all make it questionable whether that case will present a justiciable issue later this year or early next year; that same problem is not presented by the *C&NW* case. And second, the issues presented by the P&LE case as to whether a carrier has an obligation to bargain over the effects of its decision to go out of business, or whether enforcement of the Railway Labor Act is prohibited by the Fifth Amendment to the Constitution of the United States, do not raise issues over which the circuits are in dispute at this time and, more important, will further complicate an already complicated question which the parties have found difficult to brief in less than fifty (50) pages.

CONCLUSION

For the reasons set forth herein, petitioner RLEA respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review and to reverse the judgment of that court in *RLEA v. Chicago & North Western Transportation Co., supra.*

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioner Railway Labor Executives' Association

Date: June 14, 1988

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY
and DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 18, 1987

Filed: May 31, 1988

Before LAY, Chief Judge, and HEANEY and MAGILL, Circuit Judges.

HEANEY, Circuit Judge.

In this appeal, the Railway Labor Executives' Association (RLEA) asks the Court to reverse the decision of the United States District Court for the District of Minnesota. The district court refused to enjoin the sale of a section of trackage by the Chicago & Northwestern Transportation Company (C&NW) to the Dakota, Minnesota & Eastern Railroad (DM&E) until C&NW exhausted the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA). Because we find the RLA in this circumstance superseded by the authority of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (ICA), we affirm the district court.

C&NW had sought for many years to divest itself of certain marginal or light density rail lines in South Dakota. Normally, the sale or abandonment of rail lines is subject to the approval of the Interstate Commerce Commission (ICC). *See* 49 U.S.C. § 10901, 10903, 10905. The ICC had in the past refused to allow C&NW to rid itself of these rail lines because of the adverse impact of such action on the State of South Dakota.

In January, 1986, the ICC, in an ex parte rulemaking procedure, exempted as a class the sale of rail lines to "new carriers" from the prior approval requirements of the ICA. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Following this change in ICC policy, C&NW agreed on July 2, 1986, to sell 826 miles of its rail lines and assign 139 miles of its South Dakota trackage to DM&E, a newly formed railroad.

Beginning in May of 1986, when they learned of the railroad's intention to sell, seven of the unions representing C&NW employees served notices on the C&NW as required under Section 6 of the RLA, 45 U.S.C. § 156.

These notices informed C&NW of the unions' intention to negotiate agreements to require both advance notification of any proposed transfer of rail lines and appropriate employee protective conditions. The unions further sought to obtain a pledge by C&NW to require DM&E to employ C&NW employees, to assume C&NW's collective bargaining obligations, and to apply appropriate employee protective arrangements. Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).

While the parties engaged in discussions, C&NW continued with its plans to sell the South Dakota lines. Pursuant to this goal, both the C&NW and the DM&E filed verified notices with the ICC under *Ex Parte No. 392* to qualify for exemption from prior approval requirements. Once it became apparent that C&NW intended to consummate the sale, notwithstanding the fact that it had not complied with the mandatory bargaining requirements of the RLA, RLEA, an umbrella organization made up of representatives of the various rail unions representing C&NW employees, filed a complaint in the United States District Court for the District of Minnesota on August 19, 1986. In its complaint, RLEA sought a declaratory judgment that C&NW had an obligation under the RLA both to bargain over the proposed transfer and to maintain the status quo until that bargaining was concluded. RLEA also sought interlocutory and then permanent injunctive relief requiring C&NW to bargain and maintain the status quo. C&NW replied that the mandatory bargaining requirements of the RLA were preempted by the provisions of the ICA governing sales and labor protective conditions.

On August 27, 1987, the district court denied RLEA's motion for a preliminary injunction, declaring such re-

lief would "be clearly at loggerheads with the decision of the ICC, particularly as expressed in Ex Parte 392." Shortly after that ruling, C&NW and DM&E consummated the sale, and on September 5, 1987, DM&E began operating over its newly acquired trackage. Once the sale was consummated, RLEA concentrated its attack on C&NW's bargaining obligation and duty to maintain the employment status quo of its employees whom RLEA asserted were improperly affected. Both sides moved for summary judgment. On January 7, 1987, the district court orally denied RLEA's motion, again finding that the ICC's action in *Ex Parte No. 392* would be undermined if the provisions of the RLA were enforced and C&NW was required to bargain with the railroad unions. This appeal followed.

In *Burlington Northern R.R. v. United Transp. Union*, No. 87-2851, slip op. (8th Cir. May 31, 1988), a case decided today involving a similar railroad transaction exempted under *Ex Parte No. 392* from normal ICC approval requirements, we held that the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA. Specifically, we stated:

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of raiload lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping

process designed to reach labor protective agreements.

Id. at 12.

The RLEA's claim would require us to invoke the mandatory bargaining provisions of the RLA. Because in the present circumstances these provisions are superseded by the ICA, we affirm the decision of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. I cannot agree that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982) (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. The ICA focuses on national transportation policy. *See* 49 U.S.C. § 10101a. Although the interest of labor may be asserted in proceedings before the Interstate Commerce Commission (ICC), I agree with the Third Circuit's view that it is highly unlikely "that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. at 56 (3d Cir. Apr. 8, 1988). It is clear to me that the ICC lacks expertise in the field of labor security. I respectfully conclude that Congress did not intend to include labor protective conditions within the ICC proceedings so as to supersede labor's protective mechanisms under the Railway Labor Act.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86 Civ 738

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff,

vs.

CHICAGO and NORTHWESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

TRANSCRIPT EXCERPT
ORAL RULING AND ORDER OF DISTRICT COURT GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Wednesday, January 7, 1987
St. Paul Minnesota

* * * *

[18] THE COURT [Renner, J.] I have no questions. I am ready to rule, thank you.

This case is going to depend upon whether 392 in its present form applies or sinks. That's going to require decisions by courts higher than this one. But to this Court, a reading of Ex Parte 392 demonstrates that the ICC felt that it [19] is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. And the decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by Ex Parte 392.

As the Court interprets 392, the ICC intended that sales of marginal lines be facilitated. Otherwise, if they weren't being facilitated, it was the ICC's position they were going to be abandoned, and it affirmatively exercised its discretion not to impose employee protection on this class of transaction, believing that such conditions would discourage acquisition of marginal lines and disserve the public interest.

The ICC did, however, establish a procedure for those "extraordinary" cases where the imposition of protections may be appropriate, whereby a labor union may seek to revoke the blanket exemption by petition in a particular case pursuant to 49 USC, Section 10505(d). Frankly, I see no case law supporting plaintiff's distinction between the ICC's approval or authorization of a short line sale and an ICC exemption from regulation which permits the sale to go forward. An exemption to the Court is no different than an authorization. A sale cannot go forward without one or the other.

I realize that the DC circuit opinion could stand as authority to the contrary. We will have to wait and see. It's very possible and maybe probable that the parties will see fit to appeal this Court's order and get a ruling in the Eighth [20] Circuit, so that everyone would better understand the law as it's going to be committed to posterity.

Because of the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has, as you know, exclusive authority to modify or rescind Ex Parte No. 392. So I am going to deny the plaintiff's motion cross-motion for summary judgment and grant the defendants' motion for summary judgment.

Are there any questions,

MR. MOORE [Counsel for C&NW]: No, Your Honor.

THE COURT: There being none, the matter will be deemed terminated.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-738

RAILWAY LABOR EXECUTIVE ASSOCIATION,
Plaintiff,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA and EASTERN RAILROAD CORPORATION,
Defendants.

ORDER

Before the Court are defendants' motions for summary judgment and plaintiff's cross-motion for summary judgment. William J. Birney, Esq. appeared for plaintiff. Ralph J. Moore, Esq. appeared for defendant Chicago and Northwestern Transportation Company. Robert J. Corber, Esq. appeared for defendant Dakota, Minnesota and Eastern Railroad Corporation.

Based on the briefs and arguments of counsel and the entire file, IT IS HEREBY ORDERED that plaintiff's motion is denied and defendants' motions for summary judgment are granted.

Dated: January 8, 1987.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX B-2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ 3-86-738

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Plaintiff,

vs

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY
and DAKOTA, MINNESOTA and
EASTERN RAILROAD CORPORATION,
Defendants.

TRANSCRIPT EXCERPT
ORAL RULING AND ORDER OF DISTRICT COURT
DENYING PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION

Judge Renner
August 27, 1986
St. Paul, Minnesota

* * * *

[42] THE COURT [Renner, J.]: I am prepared to rule, rightly or wrongly, and I admit that it's an area that hasn't been chartered by a lot of the legal decisions which would be of any help. But I have pondered over the affect of the decision that I shall be rendering and I am convinced that if I were to grant the preliminary injunction, I would be clearly at loggerheads with the

decision of the ICC, particularly as expressed in Ex Parte 392. It does seem to me, rightly or wrongly, the matter will ultimately, I am sure, be resolved on appeal, whether this case or any case, that the ICC has assumed jurisdiction in this area, even where it might perhaps seemingly conflict with the Railway Act. I am going to deny the motion.

I am denying it also based upon my resolution of the other three aspects of Dataphase. I just feel that the threat [43] of irreparable injury—and I am impressed with the argument that really we are talking about 19 employees, and that they can be traced, the balancing of the equities and the public interest, and I am impressed with the demonstration of the interest as expressed in the amicus brief and with the assurances that rehabilitation to a line which is only the second railway operating in South Dakota, that I am safer and more likely doing justice by denying the application for preliminary injunction than were I to issue it.

That will be all.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-738

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

CHICAGO and NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA and EASTERN RAILROAD,
Defendants.

ORDER

Before the court is plaintiff's motion for a preliminary injunction. William J. Birney, Esq. appeared for plaintiff. Ralph J. Moore, Esq. appeared for defendant Chicago and North Western Transportation Company. Robert J. Corber, Esq. appeared for defendant Dakota, Minnesota and Eastern Railroad. Richard A. Allen, Esq. submitted a memorandum as amicus curiae for the State of South Dakota.

Based on the briefs and arguments of counsel, the record and the entire file, IT IS HEREBY ORDERED that plaintiff's motion is denied.

August 27, 1986.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX C

Service Date Sep. 8, 1986

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Finance Docket No. 30889

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION—ACQUISITION AND OPERATION EXEMPTION—CHICAGO AND NORTH WESTERN TRANSPORTATION

Dakota, Minnesota & Eastern Railroad Corporation (DME) has filed a notice of exemption to acquire and operate portions of the Chicago and North Western Transportation Company's (CNW's) lines between Rapid City, SD, and Winona, MN, including branch lines to Onida and Watertown, SD, and Comfrey, Hartland, and Plainview, MN; from Redfield to Mansfield, SD; and from Aberdeen, SD, to Oakes, ND. The transaction covered by the notice of exemption includes incidental trackage rights, to be granted or assigned by CNW at Rapid City, SD, and at Mankato, Owatonna, and Winona, MN; between Wolsey and Aberdeen, SD; and between Hartland, MN, and Mason City, IA. A total of 965.7 route-miles are being acquired by DME, including both the lines being purchased and the trackage rights being granted or assigned. CNW will retain limited easements in the lines between Tracy and Mankato, Mankato and Waseca, Waseca and Owatonna, and Waseca and Hartland, MN, but CNW will not be entitled to make any use of those easements for any purpose, including common carrier service, except on the occurrence of certain conditions subsequent, and subject to any required regulatory approval or exemption. Any comments must be filed with the Commission and served on Betty Jo Christian, Steptoe

& Johnson, 1330 Connecticut Avenue, N.W., Washington, DC 20036-2661.

The notice is filed under 49 C.F.R. 1150.31. If the notice contains false or misleading information the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not delay the effective date of the notice. Petitions to stay will not automatically stay the transaction.

Decided: August 27, 1986.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

/s/ Kathleen M. King
KATHLEEN M. KING
Acting Secretary

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071MN

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

May 31, 1988

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX E

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the

parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

II. Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or services is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

APPENDIX F

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers and Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Department of UTU);

Seafarers' International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation • Communications Union (TCU); and

United Transportation Union.